

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

RSI CORP., dba RESPONSIVE SYSTEMS  
COMPANY, a New Jersey corporation,

Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES  
CORPORATION, a New York corporation;  
and DOE DEFENDANTS 1-20,

Defendants.

Case No.: 5:08-cv-3414 RMW (PVT)

XXXXXXXXXXXX **STIPULATED  
PROTECTIVE ORDER**

Hon. Ronald M. Whyte

Complaint Date: February 15, 2008

Trial Date: None

**1. PURPOSES AND LIMITATIONS**

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 14.4,

below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal.

## 2. DEFINITIONS

2.1 Challenging Party: a Party or Non-Party that challenges the designation of information or items under this Order.

2.2 "CONFIDENTIAL" Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c).

2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well as their support staff).

2.4 Designated House Counsel: House Counsel who seek access to "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" information in this matter.

2.5 Designating Party: a Party or Non-Party that designates information or items that it produces in disclosures or in responses to discovery as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY".

2.6 Disclosure or Discovery Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things), that are produced or generated in disclosures or responses to discovery in this matter.

2.7 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who (1) has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action, (2) is not a past or current employee of a Party or of a Party's competitor, and (3) at the time of retention, is not anticipated to become an employee of a Party or of a Party's competitor.

2.8 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or Items: extremely sensitive "Confidential Information or Items," disclosure of which to another

1 Party or Non-Party would create a substantial risk of serious harm that could not be avoided by  
2 less restrictive means.

3 For purposes of this Stipulated Protective Order, Plaintiff RSI CORP. dba Responsive  
4 Systems Company ("RSI") objects to the need for this definition or the designation of a higher  
5 level of confidentiality "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" given the  
6 nature of the dispute and since the Parties do not anticipate "source code" will be exchanged.  
7 Notwithstanding, RSI enters into this Stipulated Protective Order in order to move the discovery  
8 process forward, but without waiver of its rights to contest the necessity for a higher level of  
9 confidentiality.

10 2.9 House Counsel: attorneys who are employees of a party to this action. House  
11 Counsel does not include Outside Counsel of Record or any other outside counsel.

12 2.10 Non-Party: any natural person, partnership, corporation, association, or other legal  
13 entity not named as a Party to this action.

14 2.11 Outside Counsel of Record: attorneys who are not employees of a party to this  
15 action but are retained to represent or advise a party to this action and have appeared in this action  
16 on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

17 2.12 Party: any party to this action, including all of its officers, directors, employees,  
18 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

19 2.13 Producing Party: a Party or Non-Party that produces Disclosure or Discovery  
20 Material in this action.

21 2.14 Professional Vendors: persons or entities that provide litigation support services  
22 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and  
23 organizing, storing, or retrieving data in any form or medium) and their employees and  
24 subcontractors.

25 2.15 Protected Material: any Disclosure or Discovery Material that is designated as  
26 "CONFIDENTIAL," or as "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY."

27 2.16 Receiving Party: a Party that receives Disclosure or Discovery Material from a  
28 Producing Party.

1     **3.     SCOPE**

2             The protections conferred by this Stipulation and Order cover not only Protected Material  
 3 (as defined above), but also (1) any information copied or extracted from Protected Material; (2)  
 4 all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,  
 5 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.  
 6 However, the protections conferred by this Stipulation and Order do not cover the following  
 7 information: (a) any information that is in the public domain at the time of disclosure to a  
 8 Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a  
 9 result of publication not involving a violation of this Order, including becoming part of the public  
 10 record through trial or otherwise; and (b) any information known to the Receiving Party prior to  
 11 the disclosure or obtained by the Receiving Party after the disclosure from a source who obtained  
 12 the information lawfully and under no obligation of confidentiality to the Designating Party. Any  
 13 use of Protected Material at trial shall be governed by a separate agreement or order.

14     **4.     DURATION**

15             Even after final disposition of this litigation, the confidentiality obligations imposed by this  
 16 Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order  
 17 otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all claims  
 18 and defenses in this action, with or without prejudice; and (2) final judgment herein after the  
 19 completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,  
 20 including the time limits for filing any motions or applications for extension of time pursuant to  
 21 applicable law.

22     **5.     DESIGNATING PROTECTED MATERIAL**

23         5.1     Exercise of Restraint and Care in Designating Material for Protection.

24             Each Party or Non-Party that designates information or items for protection under this  
 25 Order must take care to limit any such designation to specific material that qualifies under the  
 26 appropriate standards. To the extent it is practical to do so, the Designating Party must designate  
 27 for protection only those parts of material, documents, items, or oral or written communications  
 28

1 that qualify – so that other portions of the material, documents, items, or communications for  
2 which protection is not warranted are not swept unjustifiably within the ambit of this Order.

3 Mass, indiscriminate, or routinized designations are prohibited. Designations that are  
4 shown to be clearly unjustified or that have been made for an improper purpose (*e.g.*, to  
5 unnecessarily encumber or retard the case development process or to impose unnecessary  
6 expenses and burdens on other parties) expose the Designating Party to sanctions.

7 If it comes to a Designating Party's attention that information or items that it designated  
8 for protection do not qualify for protection at all or do not qualify for the level of protection  
9 initially asserted, that Designating Party must promptly notify all other parties that it is  
10 withdrawing the mistaken designation.

11 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order  
12 (*see, e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,  
13 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so  
14 designated before the material is disclosed or produced.

15 Designation in conformity with this Order requires:

16 (a) for information in documentary form (*e.g.*, paper documents, but excluding  
17 transcripts of depositions or other pretrial or trial proceedings), that the Producing Party affix the  
18 legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" to  
19 each page that contains protected material. If only a portion or portions of the material on a page  
20 qualifies for protection, the Producing Party also must clearly identify the protected portion(s)  
21 (*e.g.*, by making appropriate markings in the margins) and must specify, for each portion, the level  
22 of protection being asserted.

23 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the  
24 Designating Party identify on the record, before the close of the deposition, hearing, or other  
25 proceeding, whether the deposition or other pretrial or trial proceeding contains protected  
26 testimony and specify the level of protection being asserted, and that testimony shall be treated as  
27 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY". When it  
28 is impractical to identify separately each portion of testimony that is entitled to protection and it

1 appears that substantial portions of the testimony may qualify for protection, the Designating Party  
2 may invoke on the record (before the deposition, hearing, or other proceeding is concluded) a right  
3 to have up to 30 days from the receipt of the deposition or hearing transcript to identify the  
4 specific portions of the testimony as to which protection is sought and to specify the level of  
5 protection being asserted. Only those portions of the testimony that are appropriately designated  
6 for protection within the 30 day period following receipt of the transcript shall be covered by the  
7 provisions of this Stipulated Protective Order. Alternatively, a Designating Party may specify, at  
8 the deposition or hearing up to 30 days after receipt of the transcript if that period is properly  
9 invoked, that the entire transcript shall be treated as "CONFIDENTIAL" or "HIGHLY  
10 CONFIDENTIAL – ATTORNEYS' EYES ONLY." If at the time the testimony was taken, either  
11 Party indicates that testimony contains protected material, then the testimony and/or transcript  
12 (including but not limited to any informal or draft transcript as well as final transcript) shall be  
13 treated as if it had been designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"  
14 until the Designating Party has specified whether the material is "CONFIDENTIAL" or  
15 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." After the expiration of the 30-  
16 day period for designation, the transcript shall be treated only as actually designated.

17 Parties shall give the other parties notice if they reasonably expect a deposition, hearing or  
18 other proceeding to include Protected Material so that the other parties can ensure that only  
19 authorized individuals who have signed the "Acknowledgment and Agreement to Be Bound"  
20 (Exhibit A) are present at those proceedings. The use of a document as an exhibit at a deposition  
21 shall not in any way affect its designation as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL  
22 – ATTORNEYS' EYES ONLY."

23 Transcripts containing Protected Material shall have an obvious legend on the title page  
24 that the transcript contains Protected Material, and the title page shall be followed by a list of all  
25 pages (including line numbers as appropriate) that have been designated as Protected Material and  
26 the level of protection being asserted by the Designating Party. The Designating Party shall inform  
27 the court reporter of these requirements. Pages of transcribed deposition testimony or exhibits to  
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depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Stipulated Protective Order.

(c) for information produced in some form other than documentary and for any other tangible items, that the Producing Party affix in a prominent place on the exterior of the container or containers in which the information or item is stored the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY". If only a portion or portions of the information or item warrant protection, the Producing Party, to the extent practicable, shall identify the protected portion(s) and specify the level of protection being asserted.

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party's right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

## **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of confidentiality at any time. Unless a prompt challenge to a Designating Party's confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by providing written notice of each designation it is challenging and describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made in accordance with this specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in good faith and must begin the process by conferring directly (in voice to voice dialogue; other forms of communication are not sufficient) within 30 days of the date of service of notice. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality

1 designation was not proper and must give the Designating Party an opportunity to review the  
2 designated material, to reconsider the circumstances, and, if no change in designation is offered, to  
3 explain the basis for the chosen designation. A Challenging Party may proceed to the next stage of  
4 the challenge process only if it has engaged in this meet and confer process first or establishes that  
5 the Designating Party is unwilling to participate in the meet and confer process in a timely  
6 manner.

7       6.3     Judicial Intervention. If the Parties cannot resolve a challenge without court  
8 intervention, the Designating Party shall file and serve a motion to retain confidentiality under  
9 Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 30 days of  
10 the Parties' conference regarding the designation. Each such motion must be accompanied by a  
11 competent declaration affirming that the movant has complied with the meet and confer  
12 requirements imposed in the preceding paragraph. Failure by the Designating Party to make such a  
13 motion including the required declaration within 30 days shall automatically waive the  
14 confidentiality designation for each challenged designation. In addition, the Challenging Party  
15 may file a motion challenging a confidentiality designation at any time if there is good cause for  
16 doing so, including a challenge to the designation of a deposition transcript or any portions  
17 thereof. Any motion brought pursuant to this provision must be accompanied by a competent  
18 declaration affirming that the movant has complied with the meet and confer requirements  
19 imposed by the preceding paragraph.

20       The burden of persuasion in any such challenge proceeding shall be on the Designating  
21 Party. Frivolous challenges and those made for an improper purpose (*e.g.*, to harass or impose  
22 unnecessary expenses and burdens on other parties) may expose the Challenging Party to  
23 sanctions. Unless the Designating Party has waived the confidentiality designation by failing to  
24 file a motion to retain confidentiality as described above, all parties shall continue to afford the  
25 material in question the level of protection to which it is entitled under the Producing Party's  
26 designation until the court rules on the challenge.



1 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

2 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or  
3 produced by another Party or by a Non-Party in connection with this case only for prosecuting,  
4 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to  
5 the categories of persons and under the conditions described in this Order. When the litigation has  
6 been terminated, a Receiving Party must comply with the provisions of section 15 below (FINAL  
7 DISPOSITION).

8 Protected Material must be stored and maintained by a Receiving Party at a location and in  
9 a secure manner that ensures that access is limited to the persons authorized under this Order.

10 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered  
11 by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any  
12 information or item designated "CONFIDENTIAL" only to:

13 (a) the Receiving Party's Outside Counsel of Record in this action, as well as  
14 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the  
15 information for this litigation and who have signed the "Acknowledgment and Agreement to Be  
16 Bound" that is attached hereto as Exhibit A;

17 (b) the officers, directors, and employees (including House Counsel) of the Receiving  
18 Party to whom disclosure is reasonably necessary for this litigation and who have signed the  
19 "Acknowledgment and Agreement to Be Bound" (Exhibit A);

20 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is  
21 reasonably necessary for this litigation and who have signed the "Acknowledgment and  
22 Agreement to Be Bound" (Exhibit A);

23 (d) the court and its personnel;

24 (e) court reporters and their staff, professional jury or trial consultants, and  
25 Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have  
26 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);  
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1 (f) during their depositions, witnesses in the action to whom disclosure is reasonably  
2 necessary and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A),  
3 unless otherwise agreed by the Designating Party or ordered by the court.

4 (g) the author or recipient of a document containing the information or a custodian or  
5 other person who otherwise possessed or knew the information.

6 7.3 Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"  
7 Information or Items. Unless otherwise ordered by the court or permitted in writing by the  
8 Designating Party, a Receiving Party may disclose any information or item designated "HIGHLY  
9 CONFIDENTIAL – ATTORNEYS' EYES ONLY" only to:

10 (a) the Receiving Party's Outside Counsel of Record in this action, as well as  
11 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the  
12 information for this litigation and who have signed the "Acknowledgment and Agreement to Be  
13 Bound" that is attached hereto as Exhibit A;

14 (b) Designated House Counsel of the Receiving Party (1) who has no involvement in  
15 competitive decision-making, (2) to whom disclosure is reasonably necessary for this litigation,  
16 (3) who has signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), and (4) as to  
17 whom the procedures set forth in paragraph 7.4(a)(1), below, have been followed];

18 (c) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary for  
19 this litigation, (2) who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit  
20 A), and (3) as to whom the procedures set forth in paragraph 7.4(a)(2), below, have been  
21 followed];

22 (d) the court and its personnel;

23 (e) court reporters and their staff, professional jury or trial consultants, and  
24 Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have  
25 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A); and

26 (f) the author or recipient of a document containing the information or a custodian or  
27 other person who otherwise possessed or knew the information.  
28

1           7.4   Procedures for Approving or Objecting to Disclosure of “HIGHLY  
2 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or Items to Designated House  
3 Counsel or Experts.

4           (a)(1) Unless otherwise ordered by the court or agreed to in writing by the Designating  
5 Party, a Party that seeks to disclose to Designated House Counsel any information or item that has  
6 been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant to  
7 paragraph 7.3(b) first must advise the Designating Party of the names of Designated House  
8 Counsel.

9           (a)(2) Unless otherwise ordered by the court or agreed to in writing by the Designating  
10 Party, a Party that seeks to disclose to an Expert (as defined in this Order) any information or item  
11 that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant  
12 to paragraph 7.3(c) first must advise the Designating Party that it intends to provide protected  
13 material to an Expert; provide the full name of the Expert and the city and state of his or her  
14 primary residence; and represent that the Expert is not a current officer, director or employee of a  
15 competitor of a Party or anticipated to be one.

16           (b) A Party that makes a request and provides the information specified in the  
17 preceding respective paragraphs may disclose the subject Protected Material to the identified  
18 Designated House Counsel or Expert unless, within 15 days of delivering the request, the Party  
19 receives a written objection from the Designating Party. Any such objection must set forth in  
20 detail the grounds on which it is based.

21           (c) A Party that receives a timely written objection must meet and confer with the  
22 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by  
23 agreement within 15 days of the written objection. If no agreement is reached, the Party seeking to  
24 make the disclosure to Designated House Counsel or the Expert may file a motion as provided in  
25 Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) seeking  
26 permission from the court to do so. Any such motion must describe the circumstances with  
27 specificity, set forth in detail the reasons why the disclosure to Designated House Counsel or the  
28 Expert is reasonably necessary, assess the risk of harm that the disclosure would entail, and

1 suggest any additional means that could be used to reduce that risk. In addition, any such motion  
 2 must be accompanied by a competent declaration describing the parties' efforts to resolve the  
 3 matter by agreement (i.e., the extent and the content of the meet and confer discussions) and  
 4 setting forth the reasons advanced by the Designating Party for its refusal to approve the  
 5 disclosure.

6 In any such proceeding, the Party opposing disclosure to Designated House Counsel or the  
 7 Expert shall bear the burden of proving that the risk of harm that the disclosure would entail  
 8 (under the safeguards proposed) outweighs the Receiving Party's need to disclose the Protected  
 9 Material to its Designated House Counsel or Expert.

10 **8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN**  
 11 **OTHER LITIGATION**

12 If a Party is served with a subpoena or a court order issued in other litigation that compels  
 13 disclosure of any information or items designated in this action as "CONFIDENTIAL" or  
 14 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" that Party must:

15 (a) promptly notify in writing the Designating Party. Such notification shall include a  
 16 copy of the subpoena or court order;

17 (b) promptly notify in writing the party who caused the subpoena or order to issue in  
 18 the other litigation that some or all of the material covered by the subpoena or order is subject to  
 19 this Protective Order. Such notification shall include a copy of this Stipulated Protective Order;  
 20 and

21 (c) cooperate with respect to all reasonable procedures sought to be pursued by the  
 22 Designating Party whose Protected Material may be affected.

23 If the Designating Party timely seeks a protective order, the Party served with the subpoena  
 24 or court order shall not produce any information designated in this action as "CONFIDENTIAL"  
 25 or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" before a determination by the  
 26 court from which the subpoena or order issued, unless the Party has obtained the Designating  
 27 Party's permission. The Designating Party shall bear the burden and expense of seeking protection  
 28 in that court of its confidential material – and nothing in these provisions should be construed as

1 authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from  
2 another court.

3 **9. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN**  
4 **THIS LITIGATION**

5 (a) The terms of this Order are applicable to information produced by a Non-Party in  
6 this action and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL –  
7 ATTORNEYS' EYES ONLY". Such information produced by Non-Parties in connection with  
8 this litigation is protected by the remedies and relief provided by this Order. Nothing in these  
9 provisions should be construed as prohibiting a Non-Party from seeking additional protections.

10 (b) In the event that a Party is required, by a valid discovery request, to produce a Non-  
11 Party's confidential information in its possession, and the Party is subject to an agreement with the  
12 Non-Party not to produce the Non-Party's confidential information, then the Party shall:

13 1. promptly notify in writing the Requesting Party and the Non-Party that  
14 some or all of the information requested is subject to a confidentiality agreement with a Non-  
15 Party;

16 2. promptly provide the Non-Party with a copy of the Stipulated Protective  
17 Order in this litigation, the relevant discovery request(s), and a reasonably specific description of  
18 the information requested; and

19 3. make the information requested available for inspection by the Non-Party.

20 (c) If the Non-Party fails to object or seek a protective order from this court within 14  
21 days of receiving the notice and accompanying information, the Receiving Party may produce the  
22 Non-Party's confidential information responsive to the discovery request. If the Non-Party timely  
23 seeks a protective order, the Receiving Party shall not produce any information in its possession or  
24 control that is subject to the confidentiality agreement with the Non-Party before a determination  
25 by the court. Absent a court order to the contrary, the Non-Party shall bear the burden and  
26 expense of seeking protection in this court of its Protected Material.

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1 **10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

2 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected  
3 Material to any person or in any circumstance not authorized under this Stipulated Protective  
4 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the  
5 unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected  
6 Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the  
7 terms of this Order, and (d) request such person or persons to execute the "Acknowledgment and  
8 Agreement to Be Bound" that is attached hereto as Exhibit A.

9 **11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**  
10 **PROTECTED MATERIAL**

11 When a Producing Party gives notice to Receiving Parties that certain inadvertently  
12 produced material is subject to a claim of privilege or other protection, the obligations of the  
13 Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This  
14 provision is not intended to modify whatever procedure may be established in an e-discovery order  
15 that provides for production without prior privilege review. Pursuant to Federal Rule of Evidence  
16 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a  
17 communication or information covered by the attorney-client privilege or work product protection,  
18 the parties may incorporate their agreement in the stipulated protective order submitted to the  
19 court.

20 **12. MISCELLANEOUS**

21 12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to  
22 seek its modification by the court in the future.

23 12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective  
24 Order no Party waives any right it otherwise would have to object to disclosing or producing any  
25 information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no  
26 Party waives any right to object on any ground to use in evidence of any of the material covered  
27 by this Protective Order.  
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12.3 Filing Protected Material. Without written permission from the Designating Party or a court order secured after appropriate notice to all interested persons, a Party may not file in the public record in this action any Protected Material. A Party that seeks to file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed under seal pursuant to a court order authorizing the sealing of the specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request establishing that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the court, then the Receiving Party may file the Protected Material in the public record pursuant to Civil Local Rule 79-5(e) unless otherwise instructed by the court.

13. FINAL DISPOSITION

Within 60 days after the final disposition of this action, as defined in paragraph 4, each Receiving Party must return all Protected Material to the Producing Party or destroy such material. As used in this subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries, and any other format reproducing or capturing any of the Protected Material. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or any other format reproducing or capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION).

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

2 DATED: Sept. 16, 2010

3 R. Donlon  
4 Forrest Booth  
5 Ryan Donlon  
6 Severson & Werson  
7 Attorneys for Plaintiff

8 DATED: \_\_\_\_\_, 2010

9 Shon Morgan  
10 Scott Commerson  
11 Quinn Emanuel Urquhart & Sullivan, LLP  
12 Attorneys for Defendant

13 PURSUANT TO STIPULATION, IT IS SO ORDERED.

14 DATED: \_\_\_\_\_, 2010


15 Judge Ronald M. Whyte  
16 United States District Judge

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

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3 DATED: \_\_\_\_\_, 2010

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Forrest Booth  
Ryan Donlon  
Severson & Werson  
Attorneys for Plaintiff

DATED: Sept. 17, 2010

  
Shon Morgan  
Scott Commerson  
Quinn Emanuel Urquhart & Sullivan, LLP  
Attorneys for Defendant

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: September 23, 2010

  
XXXXXXXXXXXXXXXXXXXX U.S. Mag. Judge Patricia V. Trumbull  
XXXXXXXXXXXXXXXXXXXX

**EXHIBIT A****ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND**

I, \_\_\_\_\_ [print or type full name], of \_\_\_\_\_ [print or type full address],  
 declare under penalty of perjury that I have read in its entirety and understand the Stipulated  
 Protective Order that was issued by the United States District Court for the Northern District of  
 California on September --, 2010 in the case of *RSI CORP., dba RESPONSIVE SYSTEMS*  
*COMPANY v INTERNATIONAL BUSINESS MACHINES CORPORATION, et al.*, 5:08-cv-3414  
 RMW (PVT), pending in the United States District Court for the Northern District of California.

I agree to comply with and to be bound by all the terms of this Stipulated Protective Order  
 and I understand and acknowledge that failure to so comply could expose me to sanctions and  
 punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner  
 any information or item that is subject to this Stipulated Protective Order to any person or entity  
 except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the  
 Northern District of California for the purpose of enforcing the terms of this Stipulated Protective  
 Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint \_\_\_\_\_ [print or type full name] of \_\_\_\_\_  
 \_\_\_\_\_ [print or type full address and telephone number] as my California agent  
 for service of process in connection with this action or any proceedings related to enforcement of  
 this Stipulated Protective Order.

Date: \_\_\_\_\_

City and State where sworn and signed: \_\_\_\_\_

Printed name: \_\_\_\_\_

[printed name]

Signature: \_\_\_\_\_